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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

L. O. WARD d/b/a
L. O. WARD OIL AND GAS OPERATIONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 598 F.2d 1187. The opinion of the district court (App. C, *infra*, 22a-35a) is reported at 423 F. Supp. 1352.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 20a-21a) was entered on May 10, 1979. On August 2, 1979, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 7, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a proceeding pursuant to Section 311(b)(6) of the Federal Water Pollution Control Act (the FWPCA), 33 U.S.C. 1321(b)(6), for the assessment of a "civil penalty" against the individual owner or operator of a facility from which oil was discharged in violation of Section 311(b)(3) of the FWPCA, 33 U.S.C. 1321(b)(3), is a "criminal case" within the meaning of the Self-Incrimination Clause of the Fifth Amendment to the Constitution in which the government is barred from using any information about the discharge that is required, under pain of criminal sanctions, to be reported to the government by the individual pursuant to Section 311(b)(5) of the FWPCA, 33 U.S.C. 1321(b)(5).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 311 of the Federal Water Pollution Control Act, 33 U.S.C. (Supp. IV 1974) 1321, as in effect at the time the present case arose, is reproduced in Appendix D, *infra*, 36a-57a. Section 311 was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, and the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2467, but these amendments have no direct bearing on the present case.

STATEMENT

1. The Federal Water Pollution Control Act—commonly referred to as the Clean Water Act—sets forth a comprehensive statutory framework designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. 1251(a). As part of this overall plan, Section 311 regulates the discharge of oil and hazardous substances into navigable waters in fulfillment of the congressional policy that "there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States * * *." Section 311(b)(1).

Congress employed a number of different procedures to accomplish this "no discharge" objective. Section 311(b)(3), as in effect when this case arose, prohibited the discharge into the navigable waters of the United States or upon adjoining shorelines of oil or hazardous substances in quantities determined by the President to be "harmful." [1] The President delegated the function of determining the amount of substances that are "harmful" under this provision to the Administrator of the Environmental Protection Agency (EPA). Exec. Order No. 11735, § 1, 3 C.F.R. 793 (1971-1975 Compilation).

The President is authorized by Section 311(c)(1) to act to remove or to arrange for the removal of any oil or hazardous substance discharged into or upon the navigable waters of the United States or adjoining shorelines, unless he determines that the owner or operator of the vessel or facility from which the substance was discharged will properly remove the substance. These clean-up costs are paid out of a special revolving fund established in the Treasury by Section 311(k). Congress has from time to time appropriated money for the fund, but the fund is intended to be replenished by recoveries from those responsible for prohibited discharges. Section 311(k).

The owner or operator of the vessel or facility from which oil or a hazardous substance is discharged in

[1] Section 311(b)(3) was amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468, to prohibit the discharge of oil and hazardous substances "in such quantities as *may* be harmful" (emphasis added), as determined by the President.

violation of Section 311(b)(3) is liable to the United States for the actual costs incurred by the government in clean-up operations, except where the discharge was caused solely by an act of God, an act of war, negligence on the part of the United States, or an act or omission of a third party. Section 311(f). Funds recovered pursuant to this provision are, as mentioned above, deposited in the revolving fund established under Section 311(k).

Section 311(b)(5) of the FWPCA requires any "person in charge" of a vessel or facility from which oil or a hazardous substance is discharged in violation of Section 311(b)(3) to "immediately notify the appropriate agency of the United States Government of such discharge." This notification enables the federal government to ensure that clean-up and other remedial measures are taken promptly. Failure to notify the appropriate agency immediately is a criminal offense punishable by a fine of up to $10,000 and imprisonment for one year. Section 311(b)(5) provides, however: "Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

Section 311(b)(6), as it read at the time of the discharge involved in this case, provided that the "owner or operator" of a facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard

is operating in an amount not to exceed $5,000 for each offense. In determining the amount of the penalty or any settlement thereof, the Secretary is to take into account "the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation." [2]

Civil penalties recovered in proceedings brought under Section 311(b)(6) are paid into the revolving

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[2] Section 311(b)(6) was amended by Section 58(a)(7) and (8) of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, 1594, to provide *inter alia*, that the "person in charge" of a facility is liable for a civil penalty in addition to the "owner [or] operator" of the facility.

Section 311(b)(6) was further amended by the Federal Water Pollution Control Act Amendments of 1978, Pub. L. No. 95-576, 92 Stat. 2468, to permit the Administrator of EPA to bring an action directly in district court to recover a civil penalty of up to $50,000 against the owner, operator, or person in charge of a vessel or facility from which a substance is dicharged in violation of Section 311(b)(3). The amount of the penalty is to be determined by the same three factors utilized by the Coast Guard in assessing a penalty administratively, as well as the "standard of care manifested" and efforts to "minimize or mitigate the effects of such discharge." The penalty may be in an amount of up to $250,000 if the Administrator can show willful negligence or misconduct on the part of the defendant. This provision for the assessment of a civil penalty by an action in district court was intended to be utilized in the case of more serious discharges, and it cannot be utilized if the Coast Guard has already assessed a penalty administratively. EPA recently issued regulations and entered into a memorandum of understanding with the Coast Guard governing the assessment of civil fines in district court. 44 Fed. Reg. 50766, 50771, 50779, 50785 (1979).

fund established by Section 311(k), along with recoveries under Section 311(f) from owners or operators of the costs incurred by the United States in cleaning up discharges. Thus, the collection of civil penalties in all cases helps defray the cost of cleaning up those oil spills for which the government's clean-up costs are not otherwise recoverable—*e.g.*, where spills are not reported or cannot be traced to a particular source, where spills are caused by an act of God, an act of war, or negligence on the part of the United States, where the owner or operator of the facility at which the discharge occurred is insolvent or where the clean-up costs exceed the limitations on liability established in Section 311(f). (See App. *infra*, 9a.)

2. On or about March 23, 1975, oil escaped from an oil retention pit at a drilling facility on premises leased by L. O. Ward, d/b/a L. O. Ward Oil and Gas Operations, near the City of Enid, Oklahoma (App., *infra*, 2a, 23a; Tr. 47-48). On March 25, a sanitarian with the Oklahoma Department of Health on a routine inspection of a landfill near Ward's property observed that oil had seeped from the retention pit, down a gully, and into Boggie Creek (Tr. 47-51), a tributary of the Arkansas River system (App., *infra*, 2a). The Arkansas River is navigable in fact, and Boggie Creek is therefore also a navigable water of the United States for purposes of the FWPCA. 33 U.S.C. 1362(7) (see App., *infra*, 2a n.1, citing *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974)).

The sanitarian testified at trial that he saw oil on the surface of the creek (Tr. 50). Because the oil

was in a visible quantity, the discharge constituted a "harmful" quantity of oil within the meaning of Section 311(b)(3) and implementing regulations of EPA, 40 C.F.R. 110.3. One of Ward's employees testified at trial that he received a telephone call from the Oklahoma Department of Health on March 25, 1975, notifying him of the discharge (Tr. 77). On April 2, 1975, Ward notified the regional office of EPA—the appropriate agency for purposes of Section 311(b)(5)[3]—that a discharge of oil had taken place.[4]

[3] The President designated the Coast Guard as the "appropriate agency" for purposes of receiving the notice of a discharge required by Section 311(b)(5). Exec. Order No. 11735, *supra*, Section 7. Current Coast Guard regulations provide that such notification may be given, *inter alia*, to the government official predesignated as the On-Scene Coordinator for the geographic region in which the discharge occurs. 33 C.F.R. 153.203(a)(2). The Administrator of EPA is responsible for furnishing the On-Scene Coordinator for inland waters, 33 C.F.R. 153.103(p), and EPA is therefore an appropriate agency to receive notification under Section 311(b)(5). Notice to EPA was also appropriate at the time of the discharge in this case. 33 C.F.R. 153.203(a); 33 C.F.R. 153.105 (1975). *Cf. United States* v. *Kennecott Copper Corp.*, 523 F.2d 821, 824 (9th Cir. 1975).

[4] Ward notified EPA eight days after one of his employees was informed of the discharge by an official of the Oklahoma Department of Health. This notification would not appear to have been "immediate," as Section 311(b)(5) requires. See *United States* v. *Kennecott Copper Corp., supra; United States* v. *Ashland Oil & Transp. Co., supra.* The government argued in the court of appeals that because Ward did not notify the appropriate agency immediately, he could not take advantage of the statutory grant of use and derivative use immunity in Section 311(b)(5), which was intended to implement the Fifth Amendment privilege against self-incrimination. We do not present that issue in this petition.

Ward submitted a more complete written report of the discharge to EPA on June 25, 1975 (App., *infra*, 23a) as required by Section 308(a)(A) of the FWPCA, 33 U.S.C. 1318(a)(A).[5]

On August 15, 1975, EPA notified the Coast Guard that the oil discharge in question apparently violated Section 311(b)(3) and recommended a civil penalty in the range of $500 to $1,000, based on the statutory standards (App., *infra*, 3a). There is no indication in the record that the Coast Guard received any notice of the discharge from any other source. On December 19, 1975, after notice and opportunity for a hearing, the Coast Guard assessed a civil penalty against Ward in the amount of $500 (*ibid.*). He filed an administrative appeal from this ruling, contending that the en-

[5] Section 308(a)(A) authorizes the Administrator of EPA to require the owner or operator of any point source of effluents to make such reports, maintain such records, and provide such other information as the Administrator may require in order to enable him to develop effluent or other limitations, determine whether a person has violated existing limitations or standards, or to carry out other provisions of the FWPCA.

EPA regulations, which were in effect at the time of the discharge involved in this case, require the owner or operator of a facility at which there has been a discharge of more than 1000 gallons of oil or two or more discharges of oil in "harmful" quantities to submit a complete report of the discharge to the Regional Administrator within 60 days of the discharge. 40 C.F.R. 112.4. The discharge involved here was a "harmful" quantity of oil. 40 C.F.R. 110.3. There are civil and criminal penalties for the failure to file a report as required under these regulations. 33 U.S.C. 1319(c) and (d). EPA had requested Ward to submit the written report and advised him that failure to do so could result in imposition of criminal sanctions.

forcement scheme violated his Fifth Amendment privilege against self-incrimination. The administrative appeal was denied.

On April 13, 1976, Ward filed suit in the United States District Court for the Western District of Oklahoma against the Secretary of Transportation, the Commandant of the Coast Guard, and the Administrator of EPA to enjoin enforcement of Section 311 (b) (5) and (6) and collection of the administratively assessed penalty (App., *infra*, 3a). Ward moved to convene a three-judge court pursuant to 28 U.S.C. 2282.[6] On June 4, 1976, the United States filed a separate action in district court to collect the unpaid penalty (*ibid.*). The court denied Ward's motion to convene a three-judge court on the ground that no substantial challenge to the constitutionality of the statute was presented (App., *infra*, 23a n.2) and ordered the two cases consolidated (*id.* at 24a). The court denied Ward's motion for summary judgment, in which he raised his Fifth Amendment claim (App., *infra*, 24a-31a, 35a). The case was then tried to a jury, which found that oil from Ward's facility did spill into Boggie Creek. After considering the statutory factors to be considered in determining the amount of a penalty, the court reduced the penalty to $250 (App., *infra*, 4a).

The court of appeals reversed, holding that the civil penalty proceeding in Section 311(b)(6) is criminal

[6] 22 U.S.C. 2282 was repealed by Section 2 of Pub. L. No. 94-381, 90 Stat. 1119 (August 12, 1976), but, under Section 7 of that act, it remained in effect with respect to cases previously filed.

in nature and that notification given to the appropriate agency as required by Section 311(b)(5) could not be used in determining either liability for or the amount of the civil penalty assessed under Section 311(b)(6). The court acknowledged (App., *infra*, 9a) that payment of the civil penalties into the revolving fund to defray the costs of administration and enforcement of Section 311 and of cleaning up oil spills where those costs are not otherwise recoverable indicates the "remedial" character of the civil penalty provision. But, in concluding that the civil penalty provision is nevertheless penal or criminal in nature, the court relied upon the automatic assessment of a civil penalty without regard to fault, which it viewed as indicative of a punitive or retributive purpose, and implementing instructions issued by the Commandant of the Coast Guard, which the court believed reflected a similar purpose. The court also attached importance to the fact that the conduct involved—a discharge into navigable waters—may already be a crime under Sections 13 and 16 of the Rivers and Harbors Act, 33 U.S.C. 407 and 411 (App., *infra*, 13a, 15a-16a, citing *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)), and what it viewed as the possibly excessive amount of the penalty in relation to the remedial purposes ascribed to it where the penalty is assessed without regard to fault (*id.* at 16a-17a).

The court did not strike down either the self-reporting requirement in Section 311(b)(5) or the civil penalty provision in Section 311(b)(6); it in-

stead fashioned the use and derivative use immunity described above.[7]

REASONS FOR GRANTING THE PETITION

1. The decision by the court of appeals that a civil penalty proceeding under Section 311(b)(6) is a "criminal case" within the meaning of the Self-Incrimination Clause of the Fifth Amendment could disrupt significantly the administration and enforcement of the Federal Water Pollution Control Act. The most obvious impact would be on the ability of the Coast Guard to bring civil penalty actions against individual owners and operators of vessels and on-shore and off-shore facilities.

In calendar year 1978, there were 14,741 discharges of oil brought to the attention of the Coast Guard. The Coast Guard estimates that about 8,000 of these discharges were traced to a particular vessel or facility. Because the Coast Guard assesses at least some

[7] The court of appeals also concluded (App., *infra*, 4a-6a) that the district court had properly declined to convene a three-judge court pursuant to 28 U.S.C. 2282 in the action brought by Ward, noting that a judgment for Ward in the district court would not have restrained enforcement or operation of the FWPCA because the self-reporting system would have remained intact and civil penalties could still have been assessed if the government did not prove its case on the basis of information derived from a report submitted as required by Section 311(b)(5). See also *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960). The court remanded this action to the district court with instructions to dismiss (App., *infra*, 19a, 21a). The Secretary of Transportation, the Commandant of the Coast Guard, and the Administrator of EPA therefore do not seek review of the court of appeals judgment in that case.

penalty in all instances of proven violations, there were approximately 8,000 civil penalty cases brought in 1978. A sample of 100 civil penalty cases in each of the twelve Coast Guard districts revealed an individual owner or operator in almost a fifth of the cases.[8] This suggests that there were more than 1,400 civil penalty cases against individual owners and operators during that year.

Under the Tenth Circuit's view that these proceedings are "criminal cases" for purposes of the Fifth Amendment privilege, the government would of course be barred from compelling the individuals' testimony in any judicial proceedings to collect the penalty.[9] Moreover, the sample just mentioned indicates that about one quarter of the civil penalty cases against individual owners and operators involve self-reporting of the discharge. Thus, based on 1978 figures, the Coast Guard would be barred under the Tenth Cir-

[8] Corporations do not have a Fifth Amendment privilege against compulsory self-incrimination, see, *e.g.*, *California Bankers Assn.* v. *Schultz*, 416 U.S. 21, 71 (1974), and therefore would not be directly affected by the Tenth Circuit's constitutional holding in this case.

[9] The vast majority of civil penalties assessed at the administrative level are paid upon assessment and therefore do not require judicial proceedings for their collection, no doubt because the absence of any defenses to liability if the discharge can be traced to the particular vessel or facility creates a strong disincentive to incur additional litigation expenses. The Tenth Circuit's holding could induce increased litigation because of the possibility that civil penalty liability could be avoided altogether if the government could not establish an independent source of information about the discharge.

cuit's reasoning from making any use or derivative use of that information in some 350 civil penalty proceedings each year.[10] Coast Guard data do not indicate how many of these discharges could not have been discovered or linked to the particular individual's vessel or facility in the absence of self-reporting, but the number is no doubt significant.

What is more, even where the Coast Guard received independent evidence of the occurrence of a discharge or independent evidence tracing a discharge to a particular vessel or facility, it and other federal agencies would, under the rationale of the court of appeals' decision in this case, be put to the considerable burden of ensuring and proving that the government made no use or derivative use of the information in developing the civil penalty case. *Kastigar* v. *United States*, 406 U.S. 441, 460-461 (1972). This burden would presumably extend to proving not only that the government did not make use of the notification of the discharge under Section 311(b)(5) and information obtained from that notification, but also that it did not utilize the more complete information furnished by the individual owner or operator of a facility required, under pain of criminal or civil penalties,

[10] If a proceeding under Section 311(b)(6) were held to be a criminal case for purposes of the Fifth Amendment privilege, a further question would be presented as to what, if any, information required to be furnished by an individual under Sections 308(a)(A) and 311(b)(5) could, consistently with the Fifth Amendment, be used against the individual in the proceeding. See *California* v. *Byers*, 402 U.S. 424 (1971). We do not raise this issue in the present petition.

to be filed under Section 308(a)(A) of the FWPCA. See note 5, *supra*.

The data discussed above only pertain to civil penalty cases based on prohibited discharges of oil. Neither EPA nor the Coast Guard has yet begun to enforce the prohibitions in Section 311(b)(3) against the discharge of hazardous substances. However, on August 29, 1979, EPA published regulations governing the discharge of hazardous substances and the procedures to be followed in assessing civil penalties against those responsible for such discharges. 44 Fed. Reg. 50766 (1979). A memorandum of understanding between EPA and the Coast Guard regarding the assessment of civil penalties by the two agencies in hazardous substance cases was published on the same date. *Id.* at 50785. An as yet undetermined number of additional civil penalty cases involving the discharge of hazardous substances may therefore be anticipated in the future, some of which will surely raise the same constitutional issue presented in this case.

The implications of the decision of the court of appeals are broader still in view of the 1977 amendments to Section 311(b)(6) rendering the "person in charge" of a facility or vessel liable for a civil penalty along with the owner or operator. See note 2, *supra*. Although the Coast Guard has thus far applied this amendment principally to the masters of foreign vessels that may not be subject to the jurisdiction of the United States, the language of the amendment clearly has a potential application to the "person in charge" of any off-shore or on-shore facility as well.

Thus, the Tenth Circuit's decision could have an impact even in cases involving corporately owned and operated vessels and facilities.

To the extent that assessment of civil penalties against individual owners, operators, or persons in charge is rendered impossible by the Tenth Circuit's decision because notification of the spill was obtained solely from the individual concerned, the revolving fund established to cover clean-up and administrative costs is deprived of a source of funds intended by the Congress to sustain it. In addition, if the government were forced to establish independent evidence of the occurrence of a discharge or its source at a particular vessel or facility, the additional expense incurred would create a drain on the revolving fund, from which the costs of administering and enforcing Section 311 are paid.

Aside from the monetary loss, the obstacles to assessment of civil penalties against individual owners, operators, or persons in charge of facilities and vessels would remove an important incentive to exercise the high standard of care required by the Act, particularly in circumstances involving the potential for relatively small and therefore often undetectable spills, thereby frustrating the accomplishment of Congress' remedial purposes in providing for assessment of civil penalties. This frustration of congressional purpose would be especially pronounced if, as seems likely, the Tenth Circuit's decision were to preclude EPA from recovering a larger civil penalty of up to $50,000 ($250,000 in the case of willful negligence or

misconduct) against an individual owner, operator, or person in charge who had notified the appropriate agency of a more serious discharge warranting assessment of this larger penalty pursuant to the 1978 amendments to Section 311(b)(6). See note 2, *supra*.

2. The Tenth Circuit's holding that a proceeding to assess a civil penalty under Section 311(b)(6) is a "criminal case" for purposes of the Fifth Amendment privilege against compulsory self-incrimination is inconsistent with prior decisions of this Court. The Court has viewed the question whether a given proceeding is criminal for purposes of constitutional protections as one of statutory interpretation. See, e.g., *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391, 399, 401-402 (1938). Cf. *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 16-17. "When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word," *United States* v. *J. B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974), at least if the measure of recovery is not so excessive as to transform what was intended to be a civil penalty into a criminal penalty, *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 237. It is clear that Section 311(b)(6) was intended by the Congress to be civil in nature. The penalty is expressly denominated "civil," and the procedure for administrative assessment is civil.

To be sure, there is language in some cases indicating that the Fifth Amendment privilege against compulsory self-incrimination is broader than other constitutional rights and that the privilege may therefore apply in some forfeiture or penalty proceedings that are nominally civil. See, *e.g.*, *United States* v. *United States Coin & Currency*, 401 U.S. 715, 718 (1971); *United States* v. *Regan*, 232 U.S. 37, 50 (1914); *Hepner* v. *United States*, 213 U.S. 103 (1909); *Boyd* v. *United States*, 116 U.S. 616, 634 (1886). However, the Court has made clear that this broader reach of the Fifth Amendment privilege applies only in the case of civil penalties that are intended to be punitive rather than remedial in nature. *Helvering* v. *Mitchell*, 303 U.S. 391, 399-400 & n.3, 404 & n.12 (1938). See, *e.g.*, *United States* v. *United States Coin & Currency*, *supra*, 401 U.S. at 721-722; *Boyd* v. *United States*, *supra*, 116 U.S. at 634.

The civil penalty provisions in Section 311(b)(6) are remedial, not punitive, under this analysis. The civil penalty may be viewed as compensation to the United States for the ecological harm resulting from a spill. *United States* v. *W.B. Enterprises, Inc.*, 378 F. Supp. 420, 422-423 (S.D. N.Y. 1974). The civil penalty also furthers the FWPCA's goal of pollution-free water by imposing a type of absolute or enterprise liability on those who engage in activities creating a risk of discharge in order to fund the administration and enforcement of various provisions of Section 311. *United States* v. *Marathon Pipe Line*

Co., 589 F.2d 1305, 1309 (7th Cir. 1978). Payment of forfeitures and penalties into a fund to reimburse the government for its enforcement expenses has been held by the Court to be a remedial purpose. *One Lot Emerald Cut Stones* v. *United States*, *supra*, 409 U.S. at 237. See *United States* v. *Eureka Pipeline Co.*, 401 F. Supp. 934, 940 (N.D. W.Va. 1975).

3. The conclusion by the court of appeals that a proceeding for the assessment of penalties under Section 311(b)(6) is a "criminal case" within the meaning of the Self-Incrimination Clause is also inconsistent with the conclusion reached by a number of courts that such a proceeding is not "criminal" for purposes of the statutory immunity provision in Section 311(b)(5), which was designed to protect the Fifth Amendment privilege. See, *e.g.*, *United States* v. *Allied Towing Corp.*, 578 F.2d 978 (4th Cir. 1978); *United States* v. *Le Beouf Bros. Towing Co.*, 537 F.2d 149 (5th Cir. 1976), cert. denied, 430 U.S. 987 (1977); *Apex Oil Co.* v. *United States*, 530 F.2d 1291, 1293 n.7 (8th Cir. 1976), cert. denied 429 U.S. 827 (1977); *United States* v. *Atlantic Richfield Co.*, 429 F. Supp. 830 (E.D. Pa. 1977), aff'd *sub. nom. United States* v. *Gulf Oil Corp.*, 573 F.2d 1303 (3d Cir. 1978).[11] It is true that these cases involved corporate defendants and that there were expressions in several of the opinions that a closer scrutiny may be warranted

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[11] The Tenth Circuit in the present case also stated (App., *infra*, 18a n.7) that its constitutional holding with respect to individual defendants would not preclude the use of the notification of a discharge where a corporate defendant is involved.

in the case of an individual defendant. *United States* v. *Allied Towing Corp., supra,* 578 F.2d at 980 (concurring opinion); *United States* v. *Le Beouf Bros. Towing Co., supra,* 537 F.2d at 151-152. Nevertheless, the holding in these cases that Congress did not regard a proceeding under Section 311(b)(6) to be criminal in nature is inconsistent with the reasoning of the Tenth Circuit in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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Acting Assistant Attorney General

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SEPTEMBER 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1952

[Filed May 10, 1979]

L. O. WARD, APPELLANT

vs.

WILLIAM G. COLEMAN, JR., Individually, and as Secretary of Transportation of the United States of America; RUSSELL E. TRAIN, Individually, and as Administrator of the Environmental Protection Agency of the United States of America, and ADMIRAL OWEN W. SILAR, Individually, and as Commandant United States Coast Guard, United States of America, APPELLEES

Appeal from the United States District Court for the Western District of Oklahoma

(D.C. Nos. 76-0303-E,
76-0456-E)

L. O. Ward d/b/a
L. O. WARD OIL AND GAS OPERATORS, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Submitted: March 14, 1979

Before HOLLOWAY, BARRETT and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

L.O. Ward (Ward) appeals from the judgment in an action seeking recovery of Civil penalties assessed against him by the United States Coast Guard (Coast Guard) pursuant to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, (FWPCA).

Ward is the owner and operator of L.O. Ward Oil and Gas Operations—a sole proprietorship. On March 23, 1975, oil overflowed from a drilling site located in Garfield County, Oklahoma, into Boggie Creek, which is a distant tributary of the Arkansas River.[1]

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[1] The Arkanas River is navigable in fact. Therefore, Boggie Creek, as its tributary, is also a navigable water of the United States for purposes of the FWPCA. *See:* 33 U.S.C. 1362(7); United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974).

After discovering the spill, Ward immediately began clean-up operations in the area. Ward then submitted a report of the spill to the Environmental Protection Agency. The EPA forwarded the report to the Coast Guard [2] requesting that an assessment of civil penalties be made against Ward in accordance with 33 U.S.C. § 1321(b)(6). On December 19, 1975, following notice and opportunity to be heard, the Coast Guard assessed a $500.00 penalty against Ward for discharging oil into navigable waters in violation of 33 U.S.C. § 1321(b)(3).

Ward refused to pay the assessed penalty. He appealed the administrative ruling, contending that the enforcement scheme of § 1321 violated his Fifth Amendment privilege against self-incrimination. The administrative appeal was denied. On April 13, 1976, Ward filed suit in the District Court to enjoin enforcement of the administratively assessed penalty. At the same time, Ward moved to convene a three-judge court pursuant to 28 U.S.C. § 2282 (repealed August 12, 1976).

On June 4, 1976, the United States filed a separate action in District Court to collect the unpaid penalty and moved to consolidate the two cases for trial. The

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[2] § 1321(b)(5) of 33 U.S.C. requires any person in charge of an on-shore facility to immediately notify the Coast Guard as soon as he has knowledge of any discharge of oil or other hazardous substance into the navigable waters of the United States. Failure to immediately report such a discharge subjects the offending party to criminal sanctions of not more than $10,000 or imprisonment for not more than one year, or both.

District Court denied Ward's motion to convene a three-judge court and ordered the cases consolidated. Ward subsequently moved for summary judgment in both cases contending that his compulsory report under § 1321(b)(5) resulted in the automatic imposition of punitive sanctions under § 1321(b)(6) and therefore violated his privilege against self-incrimination.

In a memorandum opinion and order dated December 22, 1976, the District Court denied the motion for summary judgment in its entirety. Ward v. Coleman, 423 F. Supp. 1352 (W.D. Okl. 1976). The case was thereafter tried to a jury, which resulted in a verdict in favor of the Government and the assessment of a penalty against Ward in the reduced amount of $250.

On appeal, Ward contends that: (1) the trial court erred in refusing to convene a three-judge district court, and (2) the FWPCA's enforcement scheme violates the self-incrimination clause of the Fifth Amendment to the United States Constitution.

I.

Before turning to Ward's challenge based upon the self-incrimination clause of the Fifth Amendment, we must determine whether the trial court erred in refusing to convene a three-judge district court.

28 U.S.C. § 2282 requires that a three-judge court be convened in any action where a preliminary or permanent injunction is sought to restrain "the enforcement, operation or execution of any Act of Con-

gress for repugnance to the Constitution of the United States . . . ." [3] The purpose of § 2282 is "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by the issuance of a broad injunction order." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1963). If § 2282 applies, we must vacate the judgment and remand for consideration by a three-judge panel. *See*: Federal Housing Administration v. The Darlington, Inc., 352 U.S. 977 (1957).

It is axiomatic that before § 2282 comes into play, an injunction restraining the enforcement or operation of an Act of Congress must be sought. Flemming v. Nestor, 363 U.S. 603, 607 (1960). A three-judge district court need not be convened where the constitutionality of an Act of Congress is merely "drawn in question." Garment Workers v. Donnelly Company, 304 U.S. 243 (1938).

In the instant case, a judgment for Ward in the district court would not have restrained the enforcement or operation of the FWPCA. The self-reporting aspect of the Act would not have been impaired. Likewise, civil penalties could still have been assessed provided the Government could prove its case based on evidence derived from a source wholly independent of the compelled disclosure. *Cf.* Harrison v. United States, 392 U.S. 219 (1968); Wong Sun v. United States, 371 U.S. 471 (1963). In Garment Workers v. Donnelly Co., *supra*, the Court observed:

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[3] Although § 2282 has since been repealed it remains effective as to pending suits. Act of August 12, 1976, P.L. No. 94-381, 90 Stat. 1119.

> "[The predecessor of § 2282] does not provide for a case where the validity of an Act of Congress is merely drawn in question, albeit that question be decided, but only for a case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress . . . . Had Congress intended the provision . . ., for three judges and direct appeal, to apply whenever the validity of an Act of Congress became involved, Congress would naturally have used the familiar phrase 'drawn in question' " . . . .
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> 304 U.S. at 250.

See also: Flemming v. Nestor, *supra*, at 607.

We hold that the trial court did not err in refusing to convene a three-judge district court.

II.

As his primary ground for reversal, Ward contends that the self-reporting requirements of § 1321(b)(5) violate the self-incrimination clause of the Fifth Amendment when a report filed under that section is subsequently used to establish liability for purposes of assessing civil penalties pursuant to § 1321(b)(6).

It is, of course, fundamental that the Fifth Amendment protects only communications which are testimonial in nature, compelled and incriminating. *See*: Fisher v. United States, 425 U.S. 391, 408 (1976). The report mandated by sub-part (b)(5) is testimonial in character. *See*: Andreasen v. Maryland, 427 U.S. 463 (1976). Moreover, it is clear that Ward was compelled to "notify the appropriate agency of the United States Government of [the oil] discharge"

under pain of criminal prosecution. 33 U.S.C. § 1321 (b)(5). Such required self-reporting has consistently been held to be compulsory for purposes of the Fifth Amendment. Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968); Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

The basic issue we must here confront is: Whether the civil penalties prescribed in sub-part (b)(6) are, in reality, criminal in nature thereby precluding use of a compelled report made pursuant to sub-part (b)(5) of § 1321.

Judicial determinations as to the civil or penal nature of a particular provision generally center around the issue of "whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question." Telephone News-System, Inc. v. Illinois Bell Telephone Company, 220 F. Supp. 621, 630 (N.D. Ill. 1963), *aff'd*, 376 U.S. 782 (1964); Kennedy v. Mendoza-Martinez, *supra;* Trop v. Dulles, 356 U.S. 86 (1958). In undertaking our assessment of the statutory provisions here in question, we must analyze (i) the Congressional intent discernible from the face of the statute, (ii) the enforcement mechanism of the statute, and (iii) the indicators of Congressional intent enumerated by the Supreme Court in Kennedy v. Mendoza-Martinez, *supra.*[4]

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[4] *See:* Atlas Roofing Company, Inc. v. Occupational S. & H. Rev. Com'n, 518 F.2d 990 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

Statutory Language

The FWPCA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of these goals, Congress specifically prohibited the discharge of oil or other hazardous substances into the navigable waters of the United States and created a statutory enforcement scheme to carry out its mandates. *See*: 33 U.S.C. § 1321. Under the provisions of this enforcement scheme, every owner or operator of a discharging facility is required to immediately notify the Coast Guard of a discharge of oil or other hazardous substance. Should such an owner-operator fail to do so, he may be fined not more than $10,000, imprisoned for not more than one year, or both. 33 U.S.C. § 1321(b)(5).

In addition to this self-reporting requirement, owners and operators of discharging facilities are liable for clean-up costs, subject only to the defenses of act of God, act of war, negligence of the United States government, or act or omission of the third party. 33 U.S.C. § 1321(f). In the event that the discharged substance is determined to be "non removable," civil penalties may be assessed based upon toxicity, degradability, and the dispersal characteristics of the substances discharged. 33 U.S.C. § 1321 (b)(2)(B). This civil penalty is again subject to the above-enumerated defenses.

Also, each owner or operator of a discharging facility is automatically assessed a "civil penalty" in amount of not more than $5,000 for each offense. 33

U.S.C. § 1321(b)(6). The assessment of this penalty is without regard to fault and subject to no defenses. In determining the amount of the penalty, the Coast Guard is directed, by statute, to consider the "appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner of operator's ability to continue in business, and the gravity of the violation . . . ." 33 U.S.C. § 1321(b)(6). The civil penalties collected pursuant to sub-part (b)(6) and the "liquidated damages provisions" found in sub-part (b)(2)(B) are deposited into a revolving fund maintained by the Government to defray the costs of administration and cleaning up oil spills in situations where the clean-up costs are otherwise not recoverable—where spills are unreported, caused by acts of God, or committed by financially insolvent persons. *See*: 33 U.S.C. § 1321(k).

The fact that the civil penalty assessed pursuant to sub-part (b)(6) forms a part of this "revolving fund" indicates its remedial nature. *See*: United States v. Tex-Tow, Inc. 589 F.2d 1310 (7th Cir. 1978); United States v. General Motors Corporation, 403 F. Supp 1151 (D. Conn. 1975).

However, the statutory language dealing with the automatic assessment and determination of the amount of the penalty indicates a punitive intent. The penalty is assessed automatically in every case without regard to fault. No defenses are available. Thus, while the remedial purpose of the revolving fund is to defray the costs of administration and cleaning up of oil spills in situations where clean up

costs are otherwise not recoverable, the factors used in determining the amount of the penalty are not, in our view, reasonably related to the purposes of the revolving fund. Rather, the factors are based on a retributive and punitive motivation.

The civil penalty cannot be characterized as compensatory. The statute specifically provides for reimbursement of clean up costs or, in the event the substances determined as "nonremovable," liquidated damages. 33 U.S.C. §§ 1321(b)(2)(B) and 1321(f). This obligation for clean-up costs does not relieve the owner or operator of the discharging facility from liability for civil penalties under § 1321(b)(6).

Thus, in our view, while the statute, on its face, tends to evidence a punitive intent, we do not consider this determination as conclusive for purposes of treating it criminal in nature. We, therefore, turn to a consideration of the remaining factors: the administrative enforcement scheme and the Kennedy v. Mendoza-Martinez indicators of Congressional intent.

The Administrative Enforcement Scheme

The authority for assessment and collection of civil penalties pursuant to sub-part (b)(6) is vested in the United States Coast Guard. 33 U.S.C. § 1321(b)(6); Executive Order No. 11735, 38 Federal Register 21243 (1973), Reprinted 33 U.S.C.A. § 1321 (Supp. 1977). By virtue of this authority, the Coast Guard issued Commandant Instruction 5922.11A dealing with the assessment of civil penalties under sub-part (b)(6). The Commandant Instruction sets out sev-

eral criteria which the Coast Guard uses in determining the amount of penalty to be assessed:

> Consistent with the language of the Federal Water Pollution Control Act, Coast Guard policy *requires* the assessment of a civil penalty for each discharge of oil in violation of Section 311(b)(3) [1321(b)(3)]. . . . It is Coast Guard policy to assume that the penalty will be at or near the *maximum* unless a lesser penalty is justified by one of the factors listed in Section 311(b)(6) [1321(b)(6)].
>
> A number of considerations may be made in determining the gravity of a violation, such as the *degree of culpability* associated with the violation, the *prior record* of the responsible party, and the *amount of oil discharged. Substantial and intentional discharges should result in severe penalties, as should cases of gross negligence, and so on.* This is not to suggest that other considerations may not combine to determine the gravity of the violation.
>
> *Two factors should not be considered* in fixing the amount of the civil penalty: (1) *the responsible party's removal effort or expense* and (2) a decision by Federal and/or state authorities to bring criminal action for the same discharge. Liability for a civil penalty under Section 311(b)(6) [1321(b)(6)] attaches at the time of discharge. It is entirely unrelated to the subsequent removal responsibility for which the discharger must bear the expense, either directly or by reimbursing the Pollution Fund. *In no case may a responsible party avoid or reduce a*

civil penalty by removing the discharged oil . . . . (Emphasis supplied.)[5]

In our view, the administrative enforcement mechanism applied by the Coast Guard clearly indicates that the assessment and determination of the amount of the penalty is based upon punitive considerations. The Coast Guard commandant instruction "requires the assessment of a civil penalty for each discharge of oil." The factors considered in determining the amount of the penalty are further removed from the remedial aspects of the "revolving fund" than are those factors enumerated in the statute. Among other things, the Coast Guard is to consider the degree of culpability, prior record and amount of oil discharged. Intentional discharges and those resulting from gross negligence "should result in severe penalties." A party may not "avoid or reduce a civil penalty by removing the discharged oil." This language is lacking in any "remedial" ring! The costs of investigation are not considered in assessing the amount of the penalty. Similarly, the factors involved in determining the amount of the penalty are not in any way related to what damage may have occurred to the environment by reason of the discharge. *See*: United States v. W.B. Enterprises, Inc., 378 F. Supp. 420, 422-423 (S.D. N.Y. 1974).

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[5] Commandant Instruction 5922.11A is reprinted in the Appendix to United States v. LeBeouf Brothers Towing Company, Inc., 377 F. Supp. 558 (E.D. La. 1974), reversed, 537 F.2d 149 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977).

Indicators of Congressional Intent

In Kennedy v. Mendoza-Martinez, *supra*, the Supreme Court enumerated a series of "tests traditionally applied to determine whether an Act of Congress is penal or regulatory in nature":

> [I] Whether the sanction involves an affirmative disability or restraint, [II] whether it has historically been regarded as punishment, [III] whether it comes into play only on a finding of *scienter*, [IV] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [V] whether the behavior to which it applies is already a crime, [VI] whether an alternative purpose to which it may rationally be connected is assignable for it, and [VII] whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in different directions. Absent conclusive evidence of congressional intent as to the penal nature of the statute, these factors must be considered in relation to the statute on its face. (Footnotes omitted.)
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> 372 U.S., at 168-169.

[I] "Whether the sanction involves an affirmative disability or restraint." Generally, imposition of monetary penalties does not involve the type of affirmative disability or restraint which occurs in the revocation of a previously granted governmental privilege. *See*: Flemming v. Nestor, *supra*. Nevertheless, the imposition of monetary penalties does "inflict a pocket-book deterrence or restraint on the re-

cipient." Atlas Roofing Company vs. Occupational Safety and Health Review Commission, *supra*, at 1001. Thus, because a sanction is used equally for both nonpunitive and punitive purposes, it offers little indication as to Congress' intent in this instance.

[II] "[W]hether it [the sanction] has historically been regarded as punishment." This indicator also gives little indication as to Congress' intent. Monetary penalties have traditionally been applied to both criminal and civil statutes.

[III] "[W]hether the sanction is activated only on a finding of *scienter*." The statute, on its face, does not contain an element of *scienter*.[6] The fine is automatically assessed without regard to fault. Thus, at first blush, this factor seems to weigh heavily in favor of the regulatory nature of the penalty. However, the factors enumerated in the statute and the Commandant Instruction used in determining the amount of the penalty indicate a *scienter* requirement. They speak of the "gravity of the violation," "degree of culpability," and whether the discharge was intentional or resulted from gross negligence.

Moreover, the statute dealing with the imposition of criminal penalties for the discharges of oil or hazardous substances similarly does not require *scienter*. *See*: 33 U.S.C. § 407 and 411; United States v. White Fuel Corp., 498 F.2d 619 (1st Cir. 1974).

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[6] Prior to 1972, the civil penalty provision in question, then codified at 33 U.S.C. § 1161(b)(5), specifically included the element of acting "knowingly" and provided for a maximum penalty of $10,000.

Thus, this indicator lends a credence to a finding that the statute is criminal in nature.

[IV] "[W]hether the statute promotes the traditional aims of punishment—retribution and deterrence." In our view, this factor lends considerable weight to a finding that the civil penalty is actually criminal in nature. The statute and the administrative policies adopted pursuant thereto have the effect of retribution. The penalties are based on such factors as the gravity of the violation, the degree of culpability and the prior record of the party. The fact that a party acted in good faith, could not have avoided the discharge and, once it occurred, undertook clean-up measures immediately is to be given no consideration in relation to the "imposition or amount of a civil penalty."

We do not believe that the deterrence factor comes into play in any significant measure. The deterrence aspect of the statute as a whole is not found in subpart (b)(6), but rather in the compensatory damage aspects of the statute.

Thus, we conclude that the retributive aspect of the civil penalty provision weighs heavily in favor of finding the statute penal in nature.

[V] "[W]hether the behavior to which it applies is already a crime." This factor falls clearly in favor of a finding that the statute is criminal in nature. Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 specifically prohibits the discharge of refuse matter of any kind or description into the navigable waters of the United States. In United

States v. White Fuel Corporation, *supra*, the court considered § 407 and held that a tank farm operator could properly be held criminally liable where oil found in navigable waters came from an accumulation of oil which had gathered under the operator's property and seeped into the water through indirect percolation. The court characterized § 407 as a "strict liability statute" and held that common law *mens rea* need not be alleged or proven.

The factual situation presented in *White Fuel Corporation* is almost entirely analogous to the circumstances presented in this case. It is, therefore, clear that the behavior to which the civil penalty applies is already a crime.

[VI] "[W]hether an alternative purpose other than punishment may rationally be ascribed to the sanction." We have heretofore discussed the remedial aspects of the civil penalty as they refer to the Pollution Fund. In addition to these factors, the Government urges that the penalty can be regarded as compensation to the United States for tortious damage to the environment. *See*: United states v. W.B. Enterprises, Inc., *supra*. We agree that the penalty could be regarded as such compensation, if the factors involved in determining the amount thereof reasonably related to the extent of damage to the environment. However, as previously noted, the factors are not addressed to this issue. Therefore, we decline to employ the Government's rationale.

[VII] "[W]hether the sanction appears excessive in relation to the alternative purpose assigned." The

answer to this question is not easily resolved, because civil penalties are variable in nature. However, we believe that the factors employed in determining the amount of the penalty indicate a punitive nature. Imposition of penalties even in situations where the discharge is accidental, non-negligent and non-intentional, could be excessive. This is especially so, when the operator, in good faith, attempts to clean up, and, in fact, does clean up the discharge on his own initiative. Inasmuch as the amount of the penalty is correlated to the size of the business involved, a large business concern may very well be heavily penalized despite the lack of fault. Any subsequent clean up operations and attempted removal by the operator would not mitigate this penalty. Commandant Instruction 5922.11A, *supra*. In such a situation, the imposition of a large penalty would be excessive. Thus, we conclude that this indicator leans in favor of the penal nature of the Act.

We are reluctant to set aside a statutory enforcement scheme created under an Act of Congress, Flemming v. Nestor, *supra*. Nevertheless, we must recognize and abide the maxim that the privilege against self-incrimination should be liberally construed. Michigan v. Tucker, 417 U.S. 433 (1974). A detailed examination of the language of the statute, the administrative enforcement scheme, and the indicators of Congressional intent, lead us to conclude that the civil penalty found in 33 U.S.C. § 1321

(b) (6) is criminal in nature.[7] For all of the reasons above related and discussed, we therefore hold that the compelled notification of discharge required to be filed with the Coast Guard pursuant to § 1321 (b) (5) cannot be used in determining either liability for or the amount of civil penalties imposed under § 1321(b) (6). We do not, however, strike down the self-reporting requirements of § 1321(b) (5) or the statute requiring imposition of civil penalties under 1321(b) (6). In our view, it is permissible to assess civil penalties based on a discharge of oil or other hazardous substance under the Act, providing that the evidence used to establish the discharge is derived from a source wholly independent of the compelled disclosure required by § 1321(b) (5). *See*: Harrison v. United States, *supra;* Wong Sun v. United States, *supra.*[8]

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[7] We were not presented with and we do not decide the question of whether 33 U.S.C. § 1321(b) (6) is criminal in nature for any purpose other than protecting an individual's right against self-incrimination under the Fifth Amendment to the United States Constitution.

[8] We wish to emphasize that our holding today does not preclude the use of the notification of discharge filed pursuant to subpart (b) (5) in a proceeding for assessment and determination of the civil penalties under sub-part (b) (6) where a corporation, rather than an individual, is involved. *See:* United States v. Allied Towing Corporation, 578 F.2d 978 (4th Cir. 1978); United States v. LeBeouf Brothers Towing Company, Inc., supra.

Reversed and remanded for further proceedings consistent with this opinion in the collection suit, No. 76-0546E of the District Court; there being no need for injunctive relief as sought in No. 76-0303E, that cause shall be dismissed on remand.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 77-1952

MARCH TERM—May 10, 1979

Before Honorable William J. Holloway, Jr., Honorable James E. Barrett and Honorable Monroe G. McKay, Circuit Judges

L. O. WARD, PLAINTIFF-APPELLANT

vs.

WILLIAM G. COLEMAN, JR., individually and as Secretary of Transportation for the United States of America, RUSSELL E. TRAIN, individually and as Administrator of the Environmental Protection Agency of the United States of America, and ADMIRAL OWEN W. SILAR, individually and as Commandant United States Coast Guard, United States of America, DEFENDANTS-APPELLEES

and

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

L. O. WARD and L. O. WARD OIL AND GAS OPERATIONS, DEFENDANTS-APPELLANTS

OKLAHOMA INDEPENDENT PETROLEUM ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, ENERGY CONSUMERS AND PRODUCERS ASSOCIATION, INC., MOUNTAIN STATES LEGAL FOUNDATION, INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES AND ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, AMICI CURIAE

JUDGMENT

No. 77-1952

(D.C. Nos. 76-0303-E & 76-0456-E)

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that Court is reversed. The cause is remanded to the United States District Court for the Western District of Oklahoma for further proceedings in No. 76-0456-E, the collection suit, in accordance with the opinion of this Court.

It is further ordered that cause No. 76-0303-E shall be dismissed by the United States District Court for the Western District of Oklahoma on remand.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
W. D. OKLAHOMA

Nos. CIV-76-0303-E, CIV-76-0456-E

L. O. WARD, PLAINTIFF

v.

WILLIAM G. COLEMAN, JR., individually and as Secretary of Transportation for the United States of America, et al., DEFENDANTS

UNITED STATES OF AMERICA, PLAINTIFF

v.

L. O. WARD and L. O. WARD OIL AND GAS OPERATIONS, DEFENDANTS

Dec. 22, 1976

MEMORANDUM OPINION AND ORDER

EUBANKS, District Judge.

38 U.S.C. § 1321(b) provides, in pertinent part:

> "The discharge of oil or hazardous substances into or upon the navigable waters of the United States . . . is prohibited . . . .
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> * * * * *
>
> "Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged . . . shall be assessed a civil penalty . . . of not more than $5,000 for each offense. . . ."

On or about March 23, 1975, oil overflowed from an open-earth pit at a drilling site owned and operated by L. O. Ward and L. O. Ward Oil and Gas Operations and flowed into Boggie Creek, Garfield County, Oklahoma. A report of the incident was submitted by Ward and received by the Dallas office of the Environmental Protection Agency on or about June 25, 1975. The report was referred to the Second United States Coast Guard District and on the 19th of December, 1975, its Commander assessed a civil penalty of $500 against Ward.[1] On December 26, 1975, Ward appealed the assessment to the Commandant of the Coast Guard, which appeal was denied on February 11, 1976.

On April 13, 1976, Ward brought action in this court for injunctive and declaratory relief, praying that a three-judge court [2] declare unconstitutional and enjoin the enforcement of certain provisions of 33 U.S.C. §§ 1318, 1319, 1321 and of 40 C.F.R. 110.[3] On June 4, 1976, the United States of America sued Ward and L. O. Ward Oil and Gas Operations to col-

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[1] No contention is made that the Commander failed to observe the requisites of notice and opportunity to be heard.

[2] The motion to convene a three-judge court was denied conditionally on April 27, 1976, and unconditionally on August 26, 1976, on ground no substantial challenge to the constitutionality of the statute was presented.

[3] For the purpose of simplification, the challenged provisions of the statute wil be referred to as the reporting and penalty provisions of the Federal Water Pollution Control Act (FWPCA); the challenged provisions of the regulation as the "sheen" test.

lect the unpaid penalty. The actions have been consolidated.[4]

Now before the court for disposition is defendants' motion for judgment on the pleadings or for summary judgment. Defendants argue that they are entitled to judgment as a matter of law because the penalty imposed is criminal or quasi-criminal and thus the self-reporting provision violates the protection against self-incrimination afforded by the Fifth Amendment to the Constitution of the United States; because the penalty is imposed without regard to fault, and such strict liability violates the protection against undue process afforded by the Fifth Amendment; and because the regulatory "sheen" test is not such a definition of harmful quantities of spillage as is authorized by the FWPCA.[5]

CHARACTERIZATION OF THE PENALTY IMPOSED

"The question of whether a given sanction is civil or criminal is one of statutory construction." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237, 93 S.Ct. 489, 493, 34 L.Ed.2d 438 (1972); *Helvering* v. *Mitchell*, 303 U.S. 391, 399, 58 S.Ct. 630, 82 L.Ed. 917 (1938).

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[4] Hereinafter, Ward and/or L. O. Ward Oil and Gas Operations will be referred to as "defendant[s]."

[5] The Independent Petroleum Association of America has filed a brief amicus curiae joining in defendants' contentions and urging further that the court invalidate the "sheen" test as a denial of the equal protection of the laws.

The sections of the FWPCA under attack read in pertinent part:

> "(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vesesl or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.
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> "(6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's

ability to continue in business, and the gravity of the violation, shall be considered by such Secretary."

That Congress has labelled the penalty provided for in subsection (6) "civil" is entitled to due consideration. *United States* v. *J. B. Williams Co., Inc.*, 498 F.2d 414, 421 (2d Cir. 1974). Provision for administrative imposition of the penalty is indicative of congressional intent to impose a civil sanction. *Helvering, supra* at 402, 58 S.Ct. 630.

However, it is not only the characterization given that section by Congress which is significant, but its juxtaposition with and distinction from the preceding subsection's provision for criminal penalty. "The fact that the sanctions were separate and distinct and were contained in different parts of the statutory scheme is relevant in determining the character of the [penalty]." *One Lot Emerald Cut Stones, supra* 409 U.S. at 236, 93 S.Ct. at 493.

This court is of the opinion that subsection (6) is unambiguous and that congressional intent to impose a civil penalty can be discerned from its face.[6] That

[6] See *United States* v. *LeBeouf Bros. Towing Co., Inc.*, 537 F.2d 149 (5th Cir. 1976). That court stated that inquiry into the nature of the penalty is necessary only if the statutory language is ambiguous or a constitutional right is involved. At 151. Finding no Fifth Amendment issue properly before it, the protection against self-incrimination not being available to the corporate defendants, the court determined "the issue is purely one of statutory construction, and appellees are foreclosed by the clear statutory wording. . . . Congress . . . expressly labeled the sanction in 33 U.S.C. § 1161(b)(5) [the predecessor to 33 U.S.C. § 1321(b)(6)] . . . a 'civil penalty.' Only the most compelling demonstration of a contrary legislative intent would persuade us to ignore the plain words of the statute." At 152.

But see *United States* v. *General Motors Corp.*, 403 F.Supp. 1151, 1158 (Conn. 1975), in which the *Mendoza-Martinez* tests were applied because "the congressional intent is ambiguous."

determination would be an end to this matter were the issue before the court solely one of statutory construction. But the (noncorporate) defendants in this case have raised constitutional issues, and inquiry beyond the face of the statute should be undertaken "when some constitutional protection is implicated by the imposition of a penalty." *United States* v. *LeBeouf Bros. Towing Co., Inc.*, 537 F.2d 149, 151 (5th Cir. 1976); *United States* v. *J. B. Williams Co., supra* at 421.

The court deems such inquiry properly made by application of the criteria set forth in *Kennedy* v. *Mendoza-Martinez*, "the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character," to wit:

> "whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ." 372 U.S. 144, 168-169, 83 S.Ct. 554, 567, 9 L.Ed. 2d 644 (1963).

a. *Affirmative Disability or Restraint*

The question is not whether there is, or there is no, affirmative disability or restraint imposed, but whether the affirmative disability or restraint imposed is of a civil or criminal nature. This court concludes that the facts that only a monetary sanction is imposed and its collection is effectuated through a civil procedure bespeak of a civil penalty. See also *United States* v. *Eureka Pipeline Co.*, 401 F.Supp. 934, 939 (N.D.W.Va. 1975).

b. *Historical Characterization*

The result of this test can only be inconclusive: clearly, fines have long been meted out to sanction criminal conduct; on the other hand "civil penalties are not uncommon in federal law." *American Smelting & R. Co.* v. *OSHRC*, 501 F.2d 504, 515 (8th Cir. 1974); *Frank Irey, Jr., Inc.* v. *OSHRC*, 519 F.2d 1200, 1204 (3d Cir. 1975).

c. *Scienter*

"This factor clearly points toward the remedial function of the § 1321(b)(6) penalty, since there is no requirement of *scienter* in the present statute." [7] *United States* v. *General Motors Corp.*, 403 F.Supp. 1151, 1162 (Conn. 1975).

[7] In 1972, by amendment, the scienter requirement was eliminated.

d. *Purpose of the Sanction*

Defendants contend that both the intent and the effect of the imposition of this penalty is "to punish spillers of oil."

The court does not agree that the provision for a penalty was designed to effect retribution. "[T]he basic thrust of § 1321(b)(6) . . . is aimed less at the acts of polluters than at the resulting pollution itself." [8] *General Motors, supra* at 1162.

The FWPCA declares its objective to be "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a). Congress sought to facilitate achievement of this goal by, *inter alia*, including the self-reporting and penalty provisions "to prevent harmful spills [9] and to minimize the damage caused by such spills." [10] *LeBeouf Bros., supra* at 152.

That such provisions may promote the traditional criminal law aim of deterrence does not make the penalty, *ipso facto*, a criminal one. Indeed, it would be difficult to divorce the deterrent function from a regulatory scheme. "Business is encouraged to comply with the law not only because that is what the law

[8] If there be any intent to punish, it would be the intent to punish the act of not reporting an oil spill.

[9] "[B]y making care more economical than carelessness." *General Motors, supra* at 1162.

[10] By establishing in § 1321(k) "a 'revolving fund' into which all fines received under the Act are to be deposited to defray the cost of oil removals." *LeBeouf Bros., supra* at 153.

exacts but because failing to do so will bring down on the activity or purse noncriminal consequences." *Atlas Roofing Co.* v. *OSHRC*, 518 F.2d 990, 1009 (5th Cir. 1975).

e. *Whether Such Behavior is Already a Crime*

The Spilling of oil could be punished criminally. Rivers and Harbors Act, 33 U.S.C. §§ 407, 411. However, one who reports a spill would be entitled to invoke the immunity provision of § 1321(b)(5). The two courts which have had occasion to apply this test to this Act have deemed the result inconclusive. *General Motors, supra* at 1163; *Eureka Pipeline, supra* at 940.

f. *Alternative Purpose*

The court has already determined that the deterrent effect is an "unavoidable byproduct" [11] of the Act's primary objectives. Inasmuch as the purpose of the penalty is to defray the costs of the Act's administration and of clean-up expenses, and is therefore clearly compensatory and remedial, there is no need to search for some alternative [i.e., alternative to a punitive] purpose.

g. *Whether Penalty is Excessive*

The maximum penalty which may be assessed is $5,000.[12] Given the cost which would be incurred in

[11] *General Motors, supra* at 1163.

[12] Reduced from the original $10,000 provision by amendment in 1972.

removing harmful discharges, that amount does not appear excessive. Furthermore, it is significant that Congress has provided that certain "mitigating" factors [13] may be taken into acount in assessing the penalty; such "flexibility" indicates the civil character of the sanction. *General Motors, supra* at 1163. See also *Eureka Pipeline, supra* at 941.

The court concludes that the penalty provided for is a civil penalty, purposed to effectuate a regulatory and remedial scheme in which self-reporting is properly required.[14]

STRICT LIABILITY AND DUE PROCESS

The essence of strict liability is the shifting of accidental loss, as between non-negligent parties,[15] to the one most able to insure against the risk and bear the cost. In the FWPCA, Congress has chosen to shift the cost of damage done to the environment from the public to the owner or operator of the facility from which a harmful discharge emanated. Congress further saw fit to minimize defenses, in order to inspire "performance rather than excuses." [16] This court agrees

[13] See latter part of subsection (6) quoted at page 1355 herein.

[14] See *California* v. *Byers*, 402 U.S. 424, esp. 429-431, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971).

[15] The court does not thereby intend any inference as to the degree of culpability, if any, of defendants in this case.

[16] *United States* v. *White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974).

with the United States District Courts of Connecticut and the Northern District of West Virginia that the imposition of penalty after notice and hearing and after due regard given ability to pay and the gravity of the violation, withstands constitutional attack. *General Motors*, *supra* at 1157; *Eureka Pipeline*, *supra* at 942.

THE SHEEN TEST

The FWPCA, § 1321(b)(3), prohibits:

> "The discharge of oil or hazardous substance into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President under paragraph (4) of this subsection . . . ."

Subparagraph (4) provides:

> "The President shall by regulation, . . . determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States . . . ."

The authority to define harmful quantities was delegated by the President to the Secretary of the Interior. The resulting regulation, 40 C.F.R. § 110.3, provides:

> "For purposes of section 11(b) of the Federal Act, discharges of such quantities of oil into or upon the nagivable waters of the United States

> or adjoining shorelines determined to be harmful to the public health or welfare of the United States . . . include discharges which:
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> "(a) Violate applicable water quality standards, or
>
> "(b) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines."

The issue before the court is whether defendants have carried their heavy burden of showing "that the sheen test determination of harmfulness cannot be considered a reasonable expression of the Congressional will." *United States* v. *Boyd*, 491 F.2d 1163 (9th Cir. 1973).

Congress did not intend that every discharge be deemed harmful; it intended that de minimus discharges, and discharges "from a properly functioning vessel engine" [17] be exempted from the definition. The

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[17] It is this distinction which amicus curiae contends renders the sheen test violative of equal protection. The Ninth Circuit has inquired into the exemption at length, in *United States* v. *Boyd*, *supra* at 1169:

> "Appellant further contends that the exception to the sheen test—i.e., 'discharges of oil from a properly functioning vessel engine . . . '—demonstrates the irrationality of the sheen test itself. He points out that this exception allows a ship captain to escape the nonreporting penalty for any amount of oil spilled from a properly functioning engine, whether or not it is enough to create a sheen. In other words, the harmfulness of the spill is made to depend on its source. While at first blush this

sheen test distinguishes the harmful from the de minimus spill on the basis of what can be observed, rather than measured. The Court of Appeals for the Ninth Circuit has reasoned:

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may seem a curious result, we are persuaded that the exception is reasonable. . . .

"Determination of harmfulness 'to the public health or welfare of the United States' requires balancing the competing interests of environmental protection and unrestricted passage on navigable waters. It is precisely this balancing which the 'properly functioning engines' exception reflects. Indeed, the exception was included in the Regulations at the behest of Congress. When the Regulations were originally proposed, after passage of the Act, the sheen test did not contain the exception. During committee hearings on the proposed Regulations, Senator Muskie remarked:

. . . At a minimum the President can and should immediately by regulation prohibit the discharge of oil which exceeds the amount normally anticipated in operation of a vessel. . . .

It is obvious, then, that *both committees* [the House and Senate committees working on the bill] *felt that the minimal amounts of oil discharged in the normal operation of a properly functioning vessel engine ought not to be subject to the notice requirements of the law. . . . (Emphasis added.)*" [*Citation omitted.*]

After these hearings, the exception was adopted by the Department." 40 C.F.R. § 110.6.

The regulation thus was a reflection of congressional intent to discriminate in favor of a specific class so as to avoid unduly burdening waterway traffic and commerce. Unequal protection is not precluded by the Fifth Amendment, but only such discriminatory classification—not involved here—as is so arbitrary and injurious as to violate due process. *Detroit Bank* v. *United States*, 317 U.S. 329, 337-38, 63 S.Ct. 297, 87 L.Ed. 304 (1943).

"As a practical matter, the sheen test is more appropriate than, for example, a numerical test, or a determination that a 'substantial' amount of spilled oil is harmful. A numerical test creates not only the inherent difficulty of accurate observation as to the quality discharged, it also may spawn an incentive to be inaccurate so as to avoid the obligation of reporting. Moreover, if the term 'substantial' were used, there would be endless confusion over its meaning." *United States* v. *Boyd, supra* at 1168.

That court concluded: "Nothing has been shown on the facts in this case, to indicate that the Department's Regulations determining harmfulness go beyond the statutory mandate." At 1170. Other courts have agreed. *United States* v. *Chevron Oil Co.*, CIV-74-400 (E.D. La., filed Oct. 11, 1976); *United States* v. *Beatty, Inc.*, 401 F.Supp. 1040 (W.D. Ky. 1975). This court does too.

Accordingly,

IT IS ORDERED that defendants' motion for judgment on the pleadings or for summary judgment be and the same hereby is denied.

APPENDIX D

Section 311 of the Federal Water Pollution Control Act, 33 U.S.C. (Supp. IV 1974) 1321, as in effect at the time this case arose, read:

Oil and hazardous substance liability—

(a) Definitions.

For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping;

(3) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) "public vessel" means a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) "United States" means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) "owner or operator" means (A) in the case of a vessel, any person owning,

operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) "person" includes an individual, firm, corporation, association, and a partnership;

(8) "remove" or "removal" refers to removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States other than a vessel or a public vessel;

(12) "act of God" means an act occasioned by an unanticipated grave natural disaster;

(13) "barrel" means 42 United States gallons at 60 degrees Fahrenheit;

(14) "hazardous substance" means any substance designated pursuant to subsection (b)(2) of this section.

(b) Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; determination of removability; liability; penalties.

(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.

(2)(A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone, present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B)(i) The Administrator shall include in any designation under subparagraph (A) of this subsection a determination whether any such designated hazardous substance can actually be removed.

(ii) The owner or operator of any vessel, onshore facility, or offshore facility from which there is discharged during the two-year period beginning on October 18, 1972, any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject

to the defenses to liability provided under subsection (f) of this section, as appropriate, to the United States for a civil penalty per discharge established by the Administrator based on toxicity, degradability, and dispersal characteristics of such substance, in an amount not to exceed $50,000, except that where the United States can show that such discharge was a result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States for a civil penalty in such amount as the Administrator shall establish, based upon the toxicity, degradability, and dispersal characteristics of such substance.

(iii) After the expiration of the two-year period referred to in clause (ii) of this subparagraph, the owner or operator of any vessel, onshore facility, or offshore facility, from which there is discharged any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject to the defenses to liability provided in subsection (f) of this section, to the United States for either one or the other of the following penalties, the determination of which shall be in the discretion of the Administrator:

(aa) a penalty in such amount as the Administrator shall establish, based on the toxicity, degradability, and dispersal characteristics of the substance, but not less than $500 nor more than $5,000; or

(bb) a penalty determined by the number of units discharged multiplied by the amount established for such unit under

clause (iv) of this subparagraph, but such penalty shall not be more than $5,000,000 in the case of a discharge from a vessel and $500,000 in the case of a discharge from an onshore or offshore facility.

(iv) The Administrator shall establish by regulation, for each hazardous substance designated under subparagraph (A) of this paragraph, and within 180 days of the date of such designation, a unit of measurement based upon the usual trade practice and, for the purpose of determining the penalty under clause (iii) (bb) of this subparagraph, shall establish for each such unit a fixed monetary amount which shall be not less than $100 nor more than $1,000 per unit. He shall establish such fixed amount based on the toxicity, degradability, and dispersal characteristics of the substance.

(3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone, where permitted under article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine

and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation, to be issued as soon as possible after October 18, 1972, determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches except that in the case of the discharge of oil into or upon the waters of the contiguous zone, only those discharges which threaten the fishery resources of the contiguous zone or threaten to pollute or contribute to the pollution of the territory or the territorial sea of the United States may be determined to be harmful.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(6) Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

(c) Removal of discharged oil or hazardous substances; National Contingency Plan.

(1) Whenever any oil or a hazardous substance is discharged, into or upon the navigable

waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after October 18, 1972, the President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances, pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to—

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

(B) identification, procurement, maintenance, and storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil and hazardous sub-

stance pollution control equipment and material, and a detailed oil and hazardous substance pollution prevention and removal plan;

(D) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil and hazardous substances to the appropriate Federal agency;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances;

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters; and

(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or

States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal.

The President may, from time to time, as he deems advisable revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

(d) Maritime disaster discharges.

Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil, or of a hazardous substance from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection shall be a cost incurred by the United States Government for the purposes of subsection (f) of this

section in the removal of oil or hazardous substance.

(e) Judicial relief.

In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

(f) Liability for actual costs of removal.

(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to

the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $100 per gross ton of such vessel or $14,000,000, whichever is lesser, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $8,000,000, except

that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government

for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $8,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

(g) Third party liability.

In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D)

an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed $100 per gross ton of such vessel or $14,000,000, whichever is the lesser. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

(h) Rights against third parties who caused or contributed to discharge.

The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or

(2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.

(i) Recovery of removal costs.

(1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the funds established pursuant to subsection (k) of this section.

(j) Regulations; penalty.

(1) Consistent with the National Contingency Plan required by subsection (c)(2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore faciilties, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than $5,000 for each such violation. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall have been given notice and an opportunity for a hearing on such charge. In determining the

amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

(k) Authorization of appropriations.

There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury not to exceed $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (*l*) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

(*l*) Administration.

The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

(m) Boarding and inspection of vessels; arrest; execution of warrants or other process.

Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

(n) Jurisdiction.

The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i)(1) of this section, arising under this section. In the case of Guam and the Trust Territory of the Pacific Islands, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

(o) Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected.

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

(p) Financial responsibility.

(1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil or hazardous substances as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be

prescribed from time to time by the President, evidence of financial responsibility of $100 per gross ton, or $14,000,000 whichever is the lesser, to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective April 3, 1971, with respect to oil and one year after October 18, 1972, with respect to hazardous substances. The President shall delegate the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days after October 18, 1972. Regulations necessary to implement this subsection shall be issued within six months after October 18, 1972.

(3) Any claim for costs incurred by such vessel may be brought directly against the insurer or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner

or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

(4) Any owner or operator of a vessel subject to this subsection, who fails to comply with the provisions of this subsection or any regulation issued thereunder, shall be subject to a fine of not more than $10,000.

(5) The Secretary of the Treasury may refuse the clearance required by section 91 of Title 46 to any vessel subject to this subsection, which does not have evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(6) The Secretary of the Department in which the Coast Guard is operated may (A) deny entry to any port or place in the United States or the navigable waters of the United States, to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection, which upon request, does not produce evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

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